

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSHUA ADAMS)	
Claimant)	
VS.)	
)	Docket No. 230,849
SMITH TEMPORARY SERVICES)	
Respondent)	
AND)	
)	
LEGION INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals the preliminary hearing Order of Administrative Law Judge Jon L. Frobish of September 18, 1998.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment with respondent?
- (2) Should claimant be denied benefits due to horseplay or fighting with a co-employee?
- (3) Is claimant entitled to temporary total disability compensation beginning January 27, 1998?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the entire record, the Appeals Board finds, for preliminary hearing purposes, as follows:

Findings of Fact

Claimant was a temporary employee for Evcon Industries, hired through respondent, Smith Temporary Services. While employed at Evcon Industries, claimant and a coworker by the name of Daryl Baker had several personal disputes. On January 26, 1998, the date

of accident, the claimant and Mr. Baker got into another dispute regarding the completion of scrap sheets. Mr. Baker advised claimant that it was not his responsibility to complete claimant's scrap sheets. At that time, claimant threatened to break Mr. Baker's jaw.

Mr. Baker reported the threat to his supervisors, which resulted in claimant's termination from Evcon Industries and being returned to Smith Temporary Services. Following his meeting with his supervisors and his termination, claimant started to leave the plant. At this point, the evidence becomes somewhat convoluted. Claimant alleges he was attacked by Mr. Baker, unprovoked. However, other witnesses testified they saw claimant strike Mr. Baker in the head and the neck more than once, which caused Mr. Baker to grab a two-by-two piece of wood and defend himself against claimant's assault. The end result is that claimant received injuries to his head, neck, left arm, and right shoulder, and was taken to the emergency room by ambulance. Claimant was ultimately terminated by Smith Temporary Services, and Mr. Baker was terminated by Evcon Industries.

The Administrative Law Judge denied claimant's request for benefits, finding his story to be neither logical nor credible, and further finding that claimant was involved in "horseplay" which resulted in his injuries.

Conclusions of Law

In proceedings under the Workers Compensation Act, the burden of proof shall be on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 44-508(g). In order for a claimant to collect workers compensation benefits under the Kansas Workers Compensation Act, he must suffer an injury arising out of and in the course of his employment. K.S.A. 1997 Supp. 44-501.

The phrase "out of" employment points to the cause or origin of the accident, and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the workman was at work in his employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984).

Respondent argues that this altercation did not occur in the course of claimant's employment, as he had been released by Evcon Industries. However, claimant was still on Evcon's premises, and was in the process of leaving the plant when the altercation occurred. In addition, claimant continued in the employ of respondent, Smith Temporary Services, at the time of the incident between he and Mr. Baker. The Appeals Board, therefore, finds that claimant's injury did arise "in the course of" his employment with respondent.

The Appeals Board must next consider whether claimant's injuries arose out of his employment. Altercations between workmen, resulting in injuries, usually do not arise out of employment, and generally will not be compensable. Addington v. Hall, 160 Kan. 268, 160 P.2d 649 (1945); Romerez v. Swift & Co., 106 Kan. 844, 189 P. 923 (1920). However, an injury sustained by an employee during an assault arises out of the employment when it arises out of the nature, conditions, obligations, and incidents of employment in the same manner as any other injury. Springston v. IML Freight, Inc., 10 Kan. App. 2d 501, 704 P.2d 394 (1985). Respondent alleges a personal conflict between claimant and his co-employee, resulting in the injury to claimant. Claimant, on the other hand, alleges the dispute arose over the completion of scrap sheets and a threat made by claimant to the co-employee.

It is generally accepted that, if an assault grows out of an argument over the performance of work, the injury is compensable. 1 Larson's Workers' Compensation Law, § 11.12(b). In this instance, a personal animosity had developed between claimant and Daryl Baker. This animosity escalated into an argument over the completion of scrap sheets, and claimant's threat against a co-employee. When claimant threatened Mr. Baker, and this threat was reported to the supervisor, claimant's job was terminated. The Appeals Board finds that the personal animosity between claimant and Mr. Baker developed into a dispute regarding employment responsibilities. Mr. Baker complained to claimant's supervisors about the threat made by claimant, which resulted in claimant's termination.

Whether claimant or Mr. Baker began the assault is irrelevant. If the injury by assault arises out of and in the course of employment, it is compensable without regard to whether claimant was the aggressor in the confrontation. Springston, supra at 505. Regardless of whether claimant threw the first punch or whether Mr. Baker attacked claimant, the dispute appears to have centered around the scrap sheets and claimant's responding threat against his coworker. This employment involvement seemed to exacerbate their personal dispute, and ultimately led to the injuries suffered by claimant. Because the assault, either with or without claimant as the aggressor, was directly associated with an on-the-job dispute between claimant and his coworker, the Appeals Board finds claimant's injuries did arise out of his employment with respondent.

A review of the evidence fails to uncover justification for finding "horseplay." This is not an appropriate reason to deny claimant benefits in this matter. The Appeals Board, therefore, finds claimant has proven accidental injury arising out of and in the course of his employment with respondent, and denial of benefits by the Administrative Law Judge is reversed.

K.S.A. 1997 Supp. 44-534a and K.S.A. 1997 Supp. 44-551 limits the party's right to appeal from preliminary hearing orders to certain jurisdictional issues. Claimant's entitlement to temporary total disability compensation is not an issue considered jurisdictional and subject to appeal from a preliminary hearing order. Therefore, this matter will be remanded back to the Administrative Law Judge to consider claimant's entitlement to temporary total disability compensation as a result of the injury suffered.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Jon L. Frobish dated September 18, 1998, should be, and is hereby, reversed, and this matter is remanded back to the Administrative Law Judge for further proceedings consistent with this decision.

IT IS SO ORDERED.

Dated this ____ day of November 1998.

BOARD MEMBER

c: Russell B. Cranmer, Wichita, KS
Christopher J. McCurdy, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director